

ORIGINAL



0000002243

BEFORE THE ARIZONA CORPORATION COMMISSION

28

COMMISSIONERS

MARC SPITZER, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN K. MAYES

In the matter of:

YUCATAN RESORTS, INC.,
3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
Mexico C.P. 77500

YUCATAN RESORTS, S.A.,
3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
Mexico C.P. 77500

RESORT HOLDINGS INTERNATIONAL, INC.,
3222 Mishawaka Avenue
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
Mexico C.P. 77500

RESORT HOLDINGS INTERNATIONAL, S.A.,
3222 Mishawaka Avenue
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
Mexico C.P. 77500

DOCKET NO. S-03539A-03-0000

**SECURITIES DIVISION'S RESPONSE
TO RESPONDENTS' JOINT MOTION
FOR SANCTIONS**

RECEIVED
2004 APR - 2 P 4:46
AZ CORP COMMISSION
DOCUMENT CONTROL

Arizona Corporation Commission

DOCKETED

APR - 2 2004

DOCKETED BY	<i>[Signature]</i>
-------------	--------------------

1 **WORLD PHANTASY TOURS, INC.,**
 2 **a/k/a MAJESTY TRAVEL**

3 **a/k/a VIAJES MAJESTY**
 4 Calle Eusebio A. Morales
 5 Edificio Atlantida, P Baja
 6 APDO, 8301 Zona 7 Panama,

7 **AVALON RESORTS, S.A.**

8 Av. Coba #82 Lote 10, 3er. Piso
 9 Cancun, Q. Roo
 10 Mexico C.P. 77500

11 **MICHAEL E. KELLY and LORY KELLY,**

12 husband and wife,
 13 29294 Quinn Road
 14 North Liberty, IN 46554;
 15 3222 Mishawaka Avenue
 16 South Bend, IN 46615;
 17 P.O. Box 2661
 18 South Bend, IN 46680,

19 Respondents.

20 The Securities Division of the Arizona Corporation Commission ("Division") hereby
 21 responds to Respondents' Joint Motion for Sanctions ("Motion") filed by respondents Yucatan
 22 Resorts, Inc., Yucatan Resorts, S.A., Resort Holdings International, Inc., Resort Holdings S.A.,
 23 World Phantasy Tours, Inc., and Michael Kelly (collectively "Respondents"). As discussed below,
 24 this Motion is ultimately predicated on two baseless accusations against the Division. Once these
 25 spurious accusations are exposed, the entire Motion becomes nothing more than a cynical attempt to
 26 vex and tax the Division. In light of this, the Division would ask that the Administrative Law
 Judge/Commission impose, pursuant to A.R.S. § 44-2038, A.A.C. R14-3-104(F)(1), and A.A.C.
 R14-3-104(F)(4), appropriate monetary sanctions against Respondents for recklessly harassing the
 Division and, in so doing, causing unnecessary delay and expense.

27 ***Discussion***

28 To support their Motion for sanctions that include both monetary penalties and the preclusion
 29 of highly probative evidence, Respondents cite to two incidents occurring during the course of this

1 administrative action. Respondents first cite to what they claim was an “untrue statement” made by
2 the Division during a pre-hearing conference on March 4, 2004. Respondents then make the claim
3 that the Division has been uncooperative in connection with Respondents’ civil discovery requests.
4 As can be readily demonstrated, these two accusations are in fact predicated on biased
5 interpretations, insidious distortions and a blatant disregard for the Administrative Law Judge’s
6 recent instructions on discovery. Because there is no merit to these accusations, it is unnecessary to
7 address the flawed reasoning in Respondents’ lengthy analysis on sanctions.

8 **I. The Division Did Not Misrepresent the Character of the Prior Securities**
9 **Division Orders to the Tribunal**

10 As with a similarly filed motion by respondent World Phantasy Tours, Inc., Respondents cite
11 to a single passage in the transcript of a March 4, 2004 pre-hearing conference to conclude that the
12 Division misled the Administrative Law Judge. Specifically, Respondents argue that the Division’s
13 comment that other state securities division had issued “rulings” against the respondents was a
14 shocking, prejudicial misstatement committed in front of the tribunal. In truth, the viability of this
15 charge rests on contextual distortions, semantics and biased interpretations. Even then, Respondents
16 seek to exaggerate the significance of this event.

17 ***Semantics***

18 To support their contention that the Division misrepresented the character of prior
19 administrative orders, Respondents resort to a subjective, hyper-technical reading of the pre-hearing
20 conference statement at issue. In so doing, Respondents manufacture purported inaccuracies in the
21 Division’s comments. This approach is neither impressive nor persuasive.

22 To illustrate the Division’s alleged mischaracterization of the prior securities division orders,
23 Respondents first attack the term “ruling.” Respondents rail against the fact that the Division noted
24 that there existed prior securities division “rulings” against respondents, when in fact what existed
25 were prior securities division “orders.” Irrespective of whether these actions involved “authoritative
26

1 indications” or “authoritative decisions,”¹ the single point advanced in this instance was the fact that
2 these actions were undertaken at the behest of securities divisions, and not real estate boards.

3 Respondents subsequently assail a second Division term: “found.” In the pre-hearing
4 conference, the Division stated that prior securities divisions had *found* the Universal Lease program
5 to be a security. Respondent’s implies that this was a misstatement in that no factual or legal findings
6 were delivered by these agencies. This analysis, of course, ignores an equally acceptable definition of
7 found: “to regard or consider.” *Webster’s II New Riverside University Dictionary, 1994.*

8 In short, Respondents’ subjective interpretation of a pre-hearing conference transcript hardly
9 establishes that the Division was misleading the administrative law judge. This point becomes all
10 the more apparent in light of the context in which this statement was made.

11 ***Contextual Distortions***

12 Respondents would have the Court believe that the Division mentioned the prior
13 administrative orders issued against multiple of the respondents in an effort to prove Respondents’
14 liability for violations of the Securities Act of Arizona. Perhaps if this were the case, Respondents
15 could at least offer a good-faith basis for attempting to more accurately describe these orders. But
16 this is simply not the case. As the pre-hearing transcript clearly demonstrates, the Division’s
17 reference to prior administrative orders was only made in the context of defending against the claim
18 that this matter belonged with the Arizona Department of Real Estate.

19 In the pre-hearing transcript passage at issue, the Division commented “*Touching on the*
20 *comment that this matter belongs in the Department of Real Estate*, there had (*sic*) been at least eight
21 and probably more securities divisions across the country that have issued rulings against the
22 respondents in this case. Clearly, they have found [the respondents’ investment programs] to be a
23 security.” (Emphasis added). *Pre-hearing transcript, March 4, 2004, p.24, lines 8-12.* From this
24 passage it is evident that the Division, in responding to a charge that this matter belonged in a
25

26 ¹ “Authoritative indication” and “Authoritative decision” are the precise definitions of “order” and “ruling,”
respectively. *Webster’s II New Riverside University Dictionary, 1994.*

1 different forum, was merely highlighting the fact that several other states had already considered and
2 concluded that the actions of respondents fell within the purview of state securities regulators.
3 Whether these administrative actions resulted in orders, rulings or decrees is beside the point; the
4 salient fact is that securities agencies, and not real estate boards, consistently took the initiative
5 against respondents and their programs.

6 Viewed within the proper context, the Division's comment was at once germane and
7 appropriate; the Division responded to respondents' challenge that this matter did not belong in the
8 current securities forum, and the Division cited outside precedent to support its position. The
9 Administrative Law Judge was consequently not presented with misleading evidence but, to the
10 contrary, was apprised of relevant information calling for further examination and review.

11 ***Respondents' Own Disingenuous Characterizations***

12 As part of their attack on the Division's reference to the administrative orders previously
13 directed against multiple of the respondents, Respondents see fit to submit their own detailed
14 characterization for the prior administrative orders. Ironically, many of these written
15 characterizations, and the conclusions that follow, are loose, slanted and/or misleading in their own
16 right.

17 For instance, after providing an interpretation for each of the administrative orders at issue,
18 Respondents proclaim that none of the administrative orders ever "made findings that the Universal
19 Lease was a security." Technically, this assertion is untrue. By definition, a "finding" is "a
20 conclusion reached after investigation or examination." *Websters II, supra*. After examining
21 existing evidence, Minnesota made a finding that the sale of vacation property management
22 programs, i.e., Universal Leases, by Resort Holdings International, Inc. and Resort Holdings
23 International, S.A. de C.V., constituted the sale of unregistered securities. Both of the respondents
24 consented to this finding. Later in 2003, the state of Kansas issued another finding that the sale of
25 Universal Leases by a sales agent for Resort Holdings International constituted the sale of an
26 investment contract, and therefore a security. This same year, the state of Wisconsin made yet

1 another such finding, concluding that Universal Leases being sold by Yucatan Resorts, S.A. de C.V.
2 were in fact an investment contract security. Yucatan Resorts, S.A. de C.V. consented to this
3 finding.

4 These administrative actions amply demonstrate that, contrary to Respondents'
5 representation, various state securities divisions have in fact already made findings that the Universal
6 Lease constituted a security. As Respondents' averment to the contrary was submitted in writing,
7 presumably after considerable reflection and review (as opposed to an oral statement made about
8 materials not in the speaker's immediate possession), this averment would appear to constitute a far
9 more serious misstatement to the tribunal.

10 *Sham Significance*

11 Finally, Respondents' trifling attack on the Division's characterization of these prior
12 administrative orders is particularly hollow in light of the fact that these orders do - and will - speak
13 for themselves. The actual administrative order documents, and not the Division's description of
14 these orders (or, for that matter, the Respondents' subsequent written descriptions), will presumably
15 impart some degree of influence as the tribunal considers issues of jurisdiction. Since these issues
16 are not scheduled for resolution until after the trial, a pre-hearing conference oral description of these
17 orders hardly prejudices or threatens the impartiality of these considerations. Viewed in its proper
18 perspective, this single passage hardly justifies Respondents' feigned outrage and indignation; it
19 similarly calls into question the actual motives behind Respondents' concerted offensive against the
20 Division.²

21 ...

22 ...

23
24 ² It is worth noting that as a general practice, the Division does not purchase pre-hearing conference
25 transcripts. The Division only became aware that Respondents had taken issue with the Division's pre-
26 hearing conference comment about prior administrative "rulings" as opposed to prior administrative
"orders" on the date in which Respondents filed their Motion for sanctions. If Respondents were so
concerned about the technical accuracy of a particular characterization made in the context of discussing a
largely unrelated matter, they could have simply requested a re-characterization from the Division.

1 **II. The Division Has Adhered to all Applicable Discovery Rules and Orders**

2 As ancillary support for their Motion for sanctions, Respondents make the claim that the
3 Division has been uncooperative and has made no effort to comply in connection with Respondents'
4 civil discovery requests. This allegation is frivolous on two levels: not only have Respondents
5 sought to pursue discovery through the inapplicable rules of civil discovery, but the administrative
6 law judge has taken under consideration a motion to clarify the acceptable means of discovery for
7 this proceeding. In light of this, Respondents' discovery complaints are remarkably inappropriate.

8 ***The Division Need Not Comply with Inapplicable Civil Discovery Requests***

9 As has been thoroughly discussed in the Securities Division's Response to Respondents
10 Yucatan Resorts, Inc., Yucatan resorts, S.A., Resort Holdings International, Inc., and Resort
11 Holdings International, S.A.'s First Set of Non-Inform Interrogatories, (as well as three other similar
12 responses, all filed on March 4, 2004 and incorporated herein by reference), Respondents have
13 systematically ignored all discovery rules applicable for administrative proceedings. Unabashedly
14 rejecting these rules, Respondents have instead chosen to continually pursue inapplicable *civil*
15 *discovery* techniques. Despite repeated reminders that their discovery methods are in contravention
16 of applicable laws and administrative rules, Respondents continue to express shock each time their
17 unauthorized discovery demands are rebuffed. Stated simply, Respondents' discovery difficulties are
18 attributable solely to their own inappropriate conduct.

19 Because Respondents are refusing to adhere to the proper discovery rules in this
20 administrative forum, their subsequent criticism of the Division's "non-compliance" is particularly
21 amusing. The fact that Respondents are now citing these same discovery difficulties as a justification
22 for sanctions against the Division is absurd.

23 ***Discovery Procedures are Currently Under Advisement***

24 As the Respondents should well know, the Administrative Law Judge has also indicated,
25 during the last pre-hearing conference on March 4, 2004, that he would review the Division's
26 objections to the Respondents' repeated attempts to pursue various civil discovery techniques in this

1 administrative proceeding (such as Respondents' submission to the Division of non-uniform
2 interrogatories). This issue is still under advisement and, consequently, Respondents have utterly no
3 grounds upon which to press their inapplicable discovery demands. Until a procedural order is
4 issued in this case that sets forth the permissible bounds of discovery in this administrative forum,
5 the Division will continue to reject Respondents' misguided discovery attempts.

6 Far from warranting sanctions, the Division's conduct in this discovery dispute has been fully
7 consistent with applicable statutes, applicable administrative rules, and the orders of the presiding
8 Administrative Law Judge. If any sanctions are warranted on the matter of discovery, surely it is
9 Respondents' conduct that need be examined.

10 ***Conclusion***

11 The two accusations against the Division that make up Respondents' Motion for sanctions
12 are baseless. There was no genuine Division "misrepresentation," and the Division has been in full
13 compliance with all appropriate administrative discovery orders and requests. It follows that
14 Respondents' Motion for sanctions is wholly without merit.

15 ...

16 ...

17 ...

18 ...

19 ...

20 ...

21 ...

22 ...

23 ...

24 ...

25 ...

26 ...

1 In truth, this Motion serves no purpose other than to harass the Division as an adjudication of
2 this matter on the merits is once again delayed. In light of this fact, the Division requests that the
3 Administrative Law Judge and Commission, pursuant the authority provided through both the
4 Arizona Revised Statutes and Arizona Administrative Code,³ award the Division its reasonable
5 attorneys' fees incurred in connection with its defense of the Motion in an amount no less than
6 \$1,000. The Division also requests that Respondents' Motion be denied in full.

7
8 RESPECTFULLY SUBMITTED this 2nd day of April, 2004.

9
10 By 

11 Jamie B. Palfai

12 Attorney for the Securities Division of the
13 Arizona Corporation Commission
14
15
16
17
18
19

20 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
21 filed this 2nd day of April, 2004, with

22 Docket Control
23 Arizona Corporation Commission
24 1200 West Washington
25 Phoenix, AZ 85007
26

³ See A.R.S. § 44-2038; see also Arizona Administrative Code R14-3-104(F)(1) & R14-3-104(F)(4)

1 COPY of the foregoing hand-delivered this
2 2nd day of April, 2004, to:

3 Mr. Marc Stern
4 Hearing Officer
5 Arizona Corporation Commission/Hearing Division
6 1200 West Washington
7 Phoenix, AZ 85007

8 COPY of the foregoing mailed
9 this 2nd day of April, 2004, to:

10 Martin R. Galbut, Esq.
11 Jeana R. Webster, Esq.
12 GALBUT & HUNTER, P.C.
13 Camelback Esplanade, Suite 1020
14 2425 East Camelback Road
15 Phoenix, Arizona 85016
16 Attorneys for Respondents Yucatan Resorts, Inc.,
17 Yucatan Resorts S.A., RHI, Inc., and RHI, S.A.

18 Paul J. Roshka, Jr., Esq.
19 James McGuire, Esq.
20 ROSHKA HEYMAN & DEWULF, P.L.C.
21 400 East Van Buren Street, Suite 800
22 Phoenix, Arizona 85004
23 Attorneys for Respondents Michael and Lory Kelly

24 Joel Held, Esq.
25 Elizabeth Yingling, Esq.
26 Jeffrey D. Gardner, Esq.
BAKER & MCKENZIE
2300 Trammell Crow Center
2001 Ross Avenue, Suite 2300
Dallas, Texas 75201
Attorneys for Respondents Yucatan Resorts, Inc.,
Yucatan Resorts S.A., RHI, Inc., and RHI, S.A.

1 Tom Galbraith, Esq.
2 Kirsten Copeland, Esq.
3 3003 North Central Avenue, Suite 1200
4 Phoenix, Arizona 85012-2915
5 Attorneys for Respondent World
6 Phantasy Tours, Inc.
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

By: 

22 N:\ENFORCE\CASES\Yucatan_Resorts.jp\PLEADING\Response to RESPONDENTS motion for sanctions.doc
23
24
25
26